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In the Supreme Court of the United States

OCTOBER TERM, 1944.

No. 367

MORRIS MALINSKI and SIDNEY RUDISH,
Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Brief in Opposition to Petition for Writ of Certiorari.

Statement.

The petitioners seek a review of the judgments of the County Court of Kings County, convicting them of the crime of Murder in the First Degree. On appeal to the Court of Appeals, the highest court of the state, the judgments of conviction were affirmed by a divided court. Extended majority and dissenting opinions were written and are reported in 292 N. Y. 360. Thereafter, petitioners made a motion for reargument which was denied on June 14, 1944, without opinion.

On May 16, 1944, a hearing was had before Honorable Thomas E. Dewey, Governor of the State of New York, to determine whether any reasons existed for extending clemency. Before decision was made, petitioners, on June 17, 1944, applied to Mr. Justice Jackson for a stay of execution pending their application for a writ of certiorari. The stay was granted on June 19, 1944. Meanwhile, sentenced under the affirming order of the Court of Appeals to be executed during the week beginning May 29, 1944, the petitioners, on May 31, received temporary respites to the week of June 19, 1944. Following the granting of the stay, the petitioners received further reprieves pending this court's decision on the present application.

Questions Presented.

Malinski contends that the admission in evidence of "certain confessions of the petitioner" was a denial of due process of law under the Fourteenth Amendment of the Constitution of the United States (Petition, p. 4) and that, "in addition to the oppressive conduct of the police and prosecuting officers there were other violations of petitioners' rights so highly prejudicial as to deprive them of a fair trial under the Fourteenth Amendment". Cited as an instance is the final address of the assistant district attorney. Malinski contends that therein "remarks were indulged in of so highly a prejudicial and vicious character as to vitiate the trial" (Petition, p. 11).

Rudish, notwithstanding no confession was received from him, contends that the reception in evidence of Malinski's confession, which was admitted only as against Malinski, "must have had tremendous influence with the jury in determining Rudish's guilt"; and, "If it were wrongfully admitted the conviction of Rudish should not be permitted to stand" (Petition, p. 12).

Record Facts Material to the Questions Presented.

General Outline of the Case.

The deceased, Leon Fox, was a patrolman of the Police Department of the City of New York, attached to the Coney Island precinct, in the Borough of Brooklyn. He was thirty-four years of age and had been a policeman for thirteen years. On the night of February 15, 1941, he set out in the company of Herman Dolinsky, the manager of a Coney Island theatre, the latter bearing a bag containing the theatre's day's receipts amounting to $700, for a bank depository in the general vicinity. As the two men neared their destination, they encountered an automobile standing still in the street, with one door open and its lights out. As Dolinsky narrated what subsequently happened, as he and the deceased passed the automobile a man leaped out, brushed Dolinsky aside and hurled himself on the deceased. Then Dolinsky heard three shots. Dolinsky started to run. He was ordered (R. 129):

"Drop the bag or I will drop you."

Dolinsky did as he was commanded. As he threw the bag away, it was seized by one of the marauders, who then fled back into the automobile and sped away. The deceased was the victim of two bullet wounds. The shots had been discharged at a distance of from six to eight inches.

Four men were involved in the murder, Morris Malinski, Sidney Rudish, Joseph Indovino and Abraham Beitler. Beitler committed suicide at some time after the homicide (R. 716). The trial proceeded against Malinski, Rudish and Indovino. All three were found guilty as charged, but as to Indovino the jury accompanied its verdict with a recommendation that he be imprisoned for life. This the jury was permitted to do under section 1045-a of the Penal Law.

The trial court, acting on the jury's recommendation, sentenced Indovino to life imprisonment. He has appealed to the Appellate Division of the Supreme Court, Second Judicial Department. [1]

Although the crime was committed in February, 1941, the petitioners and Indovino were not arrested until October, 1942, Malinski on October 23 (R. 547), and Rudish and Indovino on October 24 (R. 672). Taken into custody in the morning, Malinski was conducted to a hotel, in Brooklyn, where, at 5:30 o'clock in the afternoon, he confessed to the police (R. 589). The confession was not reduced to writing, but on October 27, at approximately two o'clock, A. M. (R. 621), Malinski made a detailed confession to an assistant district attorney which was recorded by a stenographer and received in evidence on the trial (R. 621-640). The petitioner Rudish made no confession, but incriminating admissions were forthcoming from him to one of the people's witnesses, Nathan Spielfogel. Spielfogel, serving a term of imprisonment in a state prison of from thirty to sixty years for the crime of Robbery in the First Degree, had been invited to participate in the preparations for the homicide, but had declined to do so. Nevertheless, the trial court submitted the question whether or not he was an accomplice in the crime to the jury (R. 1357). The jury's verdict imports that he was not (*People* v. *Clougher*, 246 N. Y. 106, 110). Therefore, Malinski's admissions to Spielfogel which involved him in the plans and preparations for the crime, as well as his actual participation in it, having been believed by the jury, are tantamount to a confession of guilt. We will refer to them, briefly, later.

To revert, for the moment, to Malinski and his confession which he repudiated on the trial as having been wrung from him unlawfully, under the pressure of police brutality and intimidation: his confession, first to the police and then to the district attorney was, in fact, not his first admission of guilt. The homicide was committed

1. The only direct appeal to the Court of Appeals is in a case where the penalty is death (Code of Criminal Procedure, § 517).

at approximately eleven o'clock at night (R. 371). At between one and two-thirty o'clock on the following morning, Malinski appeared at the house of his sister, Shirley Di Pisa (R. 523), in East Tenth Street, Manhattan (R. 523), where she lived with her husband, Pietro Di Pisa, and where, temporarily, a young woman in whom Malinski was interested, Virginia Goonan, also lived (R. 524). As Di Pisa laid in bed, asleep, he was aroused by Malinski's presence in the kitchen, as Mrs. Di Pisa opened the door (R. 526), Malinski was seeking shelter for the night (R. 489). He announced, in Di Pisa's and the Goonan girl's hearing, that he had shot a "cop" in Coney Island, and continued (R. 526):

> "And I got $200 in my pocket."

Malinski's brother-in-law summarily ejected him (R. 527). The Goonan girl testified that she had been lying on a couch, asleep, in another room when she was awakened by a banging on the door. Mrs. Di Pisa opened the door. Malinski asked his sister if he could remain for the night. His sister said there was no room. Malinski announced (R. 489-490):

> "We just shot a cop. We each got $200 apiece."

As Malinski's brother-in-law pushed him out in the hall, the Goonan girl arose from her couch and inquired of the departing visitor (R. 490):

> "What did you do; shoot a cop?"

Malinski's reply to the inquiry directed to him was (R. 490):

> "Get back in bed before I give you the same thing I gave the cop."

Despite the foregoing testimony the petitioners assert (Petition, p. 9): "nor was any effort made to prove any admission by him which would constitute a confession."

We turn now, again, to the case against Rudish, as it was supplied by Spielfogel. Another convict, David Yellin,[2] serving a term of imprisonment of from ten to twenty years for the crime of Robbery in the First Degree, while armed, was the intermediary through whom the conspirators sought to induce Spielfogel to join them in their plot. Describing its object with some detail, Indovino, the third of the convicted men, a few days before the homicide, asked Yellin to communicate to Spielfogel the conspirators' desire that he join them. Beitler, the fourth of the group, said to Yellin (R. 228):

> "When you see Slip[3] tonight, tell him I want him to go on the thing with me, and tell him what it is all about."

Indovino explained that he could not take part in the holdup because he was too well known in Coney Island (R. 230).

Yellin did as he was bade. Spielfogel emphatically declined to have anything to do with the plot. He distrusted Indovino. He explained to Yellin (R. 238):

> "I would not step with that ginny."

On the day preceding the homicide, Spielfogel met Rudish in a candy store on the lower east side of Manhattan, which was the *rendezvous* of this motley group. Rudish inquired (R. 313):

> "How come you are working? What is the matter with that thing? How come you ain't going in on it?"

Spielfogel replied (R. 313):

> "I don't like it, Jake; that is all."

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2. Differentiating his status from that of Spielfogel, the trial court held Yellin to be an accomplice as a matter of law (R. 1347).

3. "Slip" was Spielfogel.

On Saturday, the day of the homicide, Spielfogel and Rudish met again and, after Spielfogel repeated his reason for not entering on the homicide plot, Rudish disclosed that he, Malinski and Beitler were going "to step out on it tonight", and that he was to meet his two confederates at nine o'clock that night (R. 313). A third meeting occurred between the two men on Sunday afternoon, the day following the homicide. At this time, Rudish said to Spielfogel (R. 315-316):

> "With Moish,[4] one of these days, you are going to wind up in the sewer with him; what a * * * he is. Last night everything was fixed to do it one way and he bailed everything up. All he knows how to do is throw a couple of shots."

It was one of Rudish's tasks to steal an automobile to be used in the commission of the homicide and Spielfogel related Rudish's description to him of the manner in which he obtained one (R. 317):

> "* * * it was getting kind of close to the nine mark he said, and he knew he had to go back, so the first load[5] he seen that looked any way decent he just stepped in and he shot all the way back from Brooklyn to New York, and * * * he picked up Malinski on 8th Street, and then he rode over to Houston Street and picked 'Ebbie' (Beitler) up."

At the same time, Rudish described to Spielfogel in part, at least, what happened at the scene of the crime (R. 319):

> "He told me, he says, after he got away from the hoist, after he dropped the car, he went upon the — he got up on the Stillwell Avenue station. He says it sounded like all the sirens in New York was in Coney Island that night. Between that and the fireworks, the shooting he meant, he said he was going insane waiting for the train to come along."

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4. "Moish" was Malinski.

5. A "load" is an automobile.

Jurisdiction.

The order of the Court of Appeals affirming the judgments of the County Court is dated April 20, 1944. The motions for reargument were denied on June 14, 1944. The petition for the writ of certiorari was filed on August 18, 1944. The jurisdiction of this court is invoked under Sec. 237 (b) of the Judicial Code, as amended; 28 U. S. C. A., section 344 (b).

We hope to demonstrate that jurisdiction is totally lacking; that Malinski's "confessions" were lawfully obtained under state law; that as a matter of procedure the question whether such "confessions"[6] were or were not lawfully obtained was submitted to the jury under legally correct instructions of the trial court, and that, as to Malinski, there was no denial of due process. We hope to demonstrate, further, as to Rudish, that he is an intruder upon the due process amendment; that inasmuch as he made no confession, he is not entitled to its protection; that, procedurally, although the petitioners were jointly tried the jury was admonished that Malinski's confession, the recorded confession, was binding only on him, and finally, that apart from Malinski's confession Rudish's guilt was proved out of his own mouth, he having confided his participation in the crime to a witness who was accepted by the jury as a non-accomplice. We will prove further, as to Rudish, that his complaint that Malinski's confession "must have had tremendous influence with the jury in determining Rudish's guilt" cannot be entertained by this court if for no other reason than that Rudish declined an offer by the trial court at the close of the people's case to sever the indictment and permit him a separate trial. We submit, therefore,

6. We use the word employed by the petitioner Malinski, although in a legal sense only one was forthcoming from him, that recorded by a stenographer and received in evidence on the trial.

that none of this court's decisions dealing with due process is applicable to the present situation and that the petition is wholly devoid of merit.

Argument.

I.

The guaranty of due process of law does not furnish a right to have decisions of state courts reviewed upon the ground of alleged erroneous findings of fact or erroneous determinations of law concerning state matters. In determining whether there is any basis for the claim that petitioners were denied their constitutional rights "we must remember that the Fourteenth Amendment does not limit the powers of the States to try and deal with crimes committed within their borders, and was not intended to bring to the test of a decision of this Court every ruling made in the course of a State trial". (*Avery* v. *Alabama*, 308 U. S. 444, 446-447.) "This Court is not made, by the laws passed in pursuance of the Constitution, a court of appeal from the highest courts of the states, except to a very limited extent, and for a precisely defined purpose." (*Sauer* v. *New York*, 206 U. S. 536, 546.)

When federal power is invoked to set aside what the highest court of a state regards as a fair trial "it must be plain that a federal right has been invaded". (*Lisenba* v. *California*, 314 U. S. 219, 239.) Such a right is invaded where a defendant in a capital case is denied representation by counsel (*Powell* v. *Alabama*, 287 U. S. 45), or where by the active conduct or the connivance of the prosecution a conviction is obtained through the use of prejured testimony (*Mooney* v. *Holohan*, 294 U. S. 103) or through the use of a confession wrung from the accused by overpowering his will (*Brown* v. *Mississippi*, 297 U. S. 278; *Chambers* v. *Florida*, 309 U. S. 227), or where the trial is dominated by mob violence in the courtroom, so that there is an actual interference with the course of justice (*Moore* v. *Dempsey*, 261 U. S. 86). The case at bar is outside the

scope of those decisions. The only one with which, generically, it might be classified is *Brown* v. *Mississippi*, *supra*. There is, however, no analogy between the case at bar and *Brown* v. *Mississippi*, supra. There, no room for doubt existed as to the unlawful methods used to obtain the confessions.

> "The opinion of the state court did not set forth the evidence as to the circumstances in which the confessions were procured. That the evidence established that they were procured by coercion was not questioned."

Here, the petitioner Malinski's claims as to violence were refuted and refuted so completely and thoroughly that there can be no doubt that his charges are utterly baseless.

In the prevailing opinion in the Court of Appeals, Conway, J., wrote, concerning the admissibility of Malinski's confession:

> "It is next urged upon us that the confession should have been excluded *as a matter of law* because when Malinski was brought to the hotel he was stripped to see if there were any evidences of bullet wounds in view of the fact that the deceased officer had fired after the automobile, following the shooting, and because there was some evidence that at least one shot had struck the car. The stripping of Malinski for that purpose was concededly proper but complaint is made because he was left in his underwear for the greater part of the first day of his stay at the hotel. Malinski said that he was subjected to physical violence. The testimony as to the violence was not very strong. He said among other things that he was struck twice by a lieutenant and once by another police officer, 'but not too hard' by the latter. 'Not hard enough to throw me over. I was sitting in one of the armchairs.' His lips were not cut; his nose did not bleed; his mouth bled on the inside. Such was Malinski's testimony. He did not complain to the prison doctor because he 'didn't have no injuries'. There was no testimony as

to violence except by Malinski. Neither Rudish nor Indovino claimed to have been assaulted although in the same hotel with the same officers. Neither of them confessed to the police or District Attorney. Whether the confession therefore was induced by fear produced by threats and violence was for the jury to determine. They weighed his testimony as to the violence and they considered the fact that he was compelled to spend most of one day clothed in his underwear and a blanket and the excuse of the police that that was a way to prevent escape in the hotel. Whether these latter circumstances would produce fear so that a man would confess his crime would depend a great deal upon the type of man involved. We do not think it can be held *as a matter of law* that it brought about such fear that the confession followed. All those questions it seems to us were for the jury which saw Malinski and heard him. They were in a position to judge from his appearance and attitude what effect depriving him of his outer clothing would have upon him." [7]

The Malinski Confession.

The legality of the confession under attack must be considered not by itself but in the light of previous admissions made by Malinski to the witness Spielfogel and other testimony implicating him in the crime. First, however, we will briefly relate what Malinski recounted to the assistant district attorney to whom he confessed. He first identified a photograph of the dead conspirator, Beitler. Recalling the date of February 15, 1941, the date of the crime, Malinski said Beitler spoke to him a few days before and in-

7. *Cf.* the foregoing language with this court's observations in *Lyons* v. *Oklahoma* (88 Supreme Court Law. ed. Advance Opinions, No. 16):

> * * * "the trial judge and the jury are not only in a better position to appraise the truth or falsity of the defendant's assertions from the demeanor of the witnesses, but the legal duty is upon them to make the decision (*Lisenba* v. *California, supra,* p. 238)."

quired whether he, Malinski, could procure a car. When Malinski inquired what it was to be used for Beitler replied (R. 624):

"We've got a pay roll to take."

It was to be "taken" on Saturday night, February 15. Malinski said he could obtain one. When Beitler asked him if he could provide guns Malinski replied—so he informed the official (R. 625):

"I think I can get some."

This admission is highly significant, as we will prove by the testimony of other witnesses.

On the following day, Malinski, as he set forth in his confession, met a confederate and asked him to secure a car for Saturday. The confederate said he would steal one[8] (R. 625). Then, Malinski went on to relate, on the night of the homicide, at about nine o'clock, he met the same confederate in an automobile which the latter said he had stolen (R. 626). Malinski joined his confederate in the car and the two drove to a point where Beitler, carrying a package under his arm, entered the automobile (R. 627). Malinski was seated in the front seat. Beitler, he went on to say, displaced him and Malinski took a seat in the rear, alone (R. 627). Then, he continued, the group set out "straight to Coney Island" (R. 627). There, Malinski and his companions visited a restaurant which he described by its name.[9] At ten o'clock, the trio left the resturant, and re-entering their car, drove to a point "down near the bank" (R. 628), "waiting there for a while until we seen the messenger" (R. 629). He continued (R. 629):

"It looked like a long time to me because we were waiting there."

8. Note the admission of Rudish to Spielfogel that he stole the first "load" he could find.

9. He subsequently identified it to a detective.

Finally, as he related the details, Malinski said Beitler left the automobile, after delivering to Malinski two revolvers, one of .45 calibre and the other of .32 calibre, which he removed from the package he carried into the car, retaining two .38 calibre revolvers himself (R. 630). Then Beitler departed toward the corner. Presently, Beitler returned and moved his hand to Malinski indicating that the latter was to leave the car. Malinski continued to his interrogator (R. 630):

> "As I got out of the car, all of a sudden I seen him come running up and the next thing I heard shots. I turned around and ran back to the corner and I seen the officer falling."

Finally, Malinski said to his interrogator (R. 631):

> "Then the man[10] started to run, so he said, 'Stop or I'll shoot. He ran after him and grabbed the bag."

Corroborating Circumstances.

In discussing the crime with Spielfogel on the morning following the commission of the deed, Malinski boasted (R. 305):

> "The cop went down—the donkey went down like a ton of bricks."

He informed Spielfogel that the weapons used were "pieces" which "Red the Tippler" got out of a locker, uptown.

Simon Eisler was "Red the Tippler". His real sobriquet was "Red Tiplet" (R. 447). At the time of the trial he was a corporal in the army.

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10. The "man" was Dolinsky, the deceased's companion. We ask the court to note the similarity in the testimony of Dolinsky and the language of the confession, as to the admonition.

Eisler testified that in the latter part of December, 1940, he met Malinski, with whom he was acquainted for three years, at the Citadel Club at Fourth Street and Avenue C (R. 449). Malinski delivered to Eisler a ticket, or the stub of a ticket, together with $4, and directed him to recover a package and bring it to the Citadel Club (R. 451). Eisler recovered the package from a railroad terminal in Forty-second Street, and returned with it to the Citadel Club where Malinski opened it, in Eisler's presence, revealing four pistols, two fountain pens and two .38 calibre revolvers, wrapped in stockings (R. 452).

But that is not all.

Peter Shamin, an eighteen year old high school student, in February, 1941, was employed, part time, by a store keeper named Rouch in First Avenue, where Malinski also was employed as a stock clerk, or salesman (R. 472). On the afternoon of February 15, 1941, Malinski said to Shamin (R. 1048):

> "Go get the bag of pieces in the hall—they are between the napkin boxes—and put them in the toilet."

Shamin did as he was told. He recovered a brown paper bag:

> "I went and got the bag" (R. 1048).

The paper was heavy. So was the package (R. 1050):

> "I felt the butt of a gun" (R. 1050).

After Shamin had deposited the bag underneath the sink of the toilet, he "ran out" and Malinski followed "straight in" (R. 1051).

That ended the incident. Malinski left, at seven o'clock, for his evening meal. Shamin left, with the same object in view, at shortly before eight o'clock, and returned at eight-thirty o'clock (R. 1051). Malinski never returned, or, at least, Shamin did not see him again that night (R. 1052).

In *People* v. *Mummiani* (258 N. Y. 394, 397), a case in which Lehman, J., writing for the majority of the court, lashed out—as the same learned jurist has frequently done—at unlawful methods in obtaining confessions, nevertheless, it was pointed out:

> "A narrative so circumstantial cannot easily be reconciled with the defendant's present story that it was an utter fabrication. A multitude of circumstances not sufficient of themselves to establish the defendant's guilt bring the confessions into accord with probability."

In the "multitude of circumstances" therein referred to we find none as, singly, or all taken together, persuasive as those which we have adverted to in connection with Malinski's confession to assistant district attorney Hefferman.

We turn again, however, to the confession that the petitioners have refrained from referring to, and that is the one he made in his sister's home, in her presence, and in the presence of her husband and of a third person, a few hours after the commission of the crime.

What motive could Di Pisa, Malinski's brother-in-law, have had to fabricate evidence involving his wife's brother? None that appears, none that was proved, none that, even by suggestion—except by Malinski's weak and tepid allegation that her husband, the witness against him, had ill-treated Malinski's sister—may be seized upon as the basis of a charge that Di Pisa lied. Di Pisa's wife—Malinski's sister—did not come to his defense to deny that he had appeared at her home at an early hour in the morning following the homicide, confessing his part in it and begging refuge. If Mrs. Di Pisa, as Malinski charged, was the victim of a husband who abused her—and therefore, because Malinski as a "dutiful" brother resented his conduct, Di Pisa was not averse to swearing Malinski's life away—Mrs. Di Pisa was the best witness to the wantonness

of Di Pisa's motive. But Mrs. Di Pisa did not come to Malinski's defense to support any claim:

1. That her husband had a motive to lie her brother's life away.

2. That her brother did not confess his part in the crime in her home, within a few hours after it had been committed.

What, then, becomes of the issue of coercion, of police "brutality"? True, it was an issue in the case. The trial court, under correct, legally approved instructions submitted it to the jury as such (R. 1380-1381):

> "Under the law, therefore, you will determine, first whether or not this confession is voluntary. If you find that it was involuntarily made, or if you have a reasonable doubt about it, then you will disregard the confession entirely. On the other hand, if you find beyond a reasonable doubt that the confession is a voluntary one, you will then determine whether or not the statements inculpating the defendant therein contained are true. If you shall have resolved both of these questions in favor of the prosecution, then and only then, you will consider the confession in determining the guilt of the defendant of the crime of murder in the first degree." [11]

In *People* v. *Doran* (246 N. Y. 409), a leading case on the topic, the court said:

> "Here was an issue of fact. Who was to decide it? The jury. They had all the testimony, and the court

11. "When the state-approved instruction fairly raises the question of whether or not the challenged confession was voluntary, as this instruction did, the requirements of due process, under the Fourteenth Amendment are satisfied, and this court will not require a modification of local practice to meet views that it might have as to the advantages of concreteness" (*Lyons* v. *Oklahoma*, *infra*).

left it to them to say, after a very full and complete charge, whether or not the confession was voluntarily made, and instructed them that if they concluded that it was not voluntary, but had been obtained under the influence of fear produced by threats, they should throw it out of the case entirely, and disregard it. When there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury with the direction that they should reject the confession if upon the whole evidence they are satisfied it was not the voluntary act of the defendant."

Stripped of all its varnishings, Malinski's recital on the trial of police brutality lacked verisimilitude, wholly. From his own lips the jury was informed that Malinski suffered no external appearance of the ordeal he says he was compelled to go through: his mouth bled on the inside, but his nose did not bleed. His nose hurt him. His lips were swollen "a little", on the bottom (R. 561). But when he was committed to jail, Malinski made no complaint to the physician there. He made plain the reason (R. 563):

"I didn't have no injuries."

And, notwithstanding the ordeal he said he had been through, Malinski did not ask for the services of a physician.

The trial court (with Malinski's assistance) proceeded to demonstrate further the falsity of his defense (R. 569):

"Q. Did you appear before a Magistrate? A. The fourth day after they had me.

Q. That would be what day? A. October 27th, Tuesday morning.

Q. In the Homicide Court? A. Felony Court.

Q. Did you stand up in the presence of the Magistrate? A. Yes.

Q. Right in front of the bar? A. Yes, sir.

Q. Within his view? A. Yes, sir."

And, if further support were needed of the utter worthlessness of Malinski's claims, he supplied it himself to Mr. Hefferman, the assistant district attorney to whom he confessed. At the conclusion of his interrogation, the following occurred (R. 639):

> "Q. Now, you are making this statement voluntarily to me? A. Yes, sir.
>
> Q. Nobody forced you or did anything to you, did they? A. No.
>
> Q. How have the police treated you since you have been with them? A. All right.
>
> Q. Nobody did anything wrong to you? A. No."

Malinski was taken into custody on October 23 (R. 573). Concededly, he was not arraigned before a Magistrate or "booked", until October 27 (R. 586-587). During this time he was in the custody of police officers at the Hotel Bossert, Brooklyn. He was kept there with his consent. According to Detective McNally, Malinski, when he was asked whether he preferred to remain there, instead of being lodged in a police cell, said his preference was the hotel. Also, according to McNally, when at five-thirty o'clock on the afternoon of the day of his arrest, Malinski, admitted his part in the killing, neither Indovino nor Rudish had been apprehended (R. 589). That this is so, is borne out by the testimony of Indovino that he was arrested on October 24 (R. 672), and of Rudish that he was arrested on the same day (R. 672).

During the interval of three days following Malinski's admission of guilt and his confession to assistant district attorney Hefferman, on October 27, the police officers were continuing their investigation of the case (R. 589). That is not an unreasonable explanation of the police officers' delay in arraigning Malinski. Particularly, it is not unreasonable if it was true that Malinski acquiesced in being kept at a hotel instead of being placed in a cell.

> "In the absence of justification the detention for almost thirty six hours was illegal and though the

> illegality does not require the inference that the confession obtained was involuntary, yet it has a substantial bearing upon that disputed question" (*People* v. *Alex*, 265 N. Y. 192).

Justification here appears. Of what avail would the information supplied to them by Malinski have been to the police if prompt arraignment followed disclosures of the afternoon of October 23, and his guilty partners were put on warning and thus allowed to escape? But whether justification appears or not the court advised the jury of the effect of the police officers' delay in arraigning their prisoner. Commenting on McNally's testimony that Malinski was allowed to remain at the Hotel Bossert (with Spielfogel) at his own desire, the court instructed the jury (R. 1377):

> "Be that as it may, I charge you that it was the duty of the police to arraign the defendant before the nearest Magistrate without unnecessary delay and, further, that if a police officer failed or refused to perform such duty, he is guilty of a misdemeanor."

The foregoing instruction was followed by the following (R. 1377):

> "But, gentlemen, you will bear in mind that the police department is not on trial in this case. This testimony was adduced solely on the question as to whether or not the alleged confession later made was the result of the coercion either direct or implied, which is prohibited by the statute and which invalidates a confession. If you should find that the arraignment of the defendant was delayed, you may consider that on the question of the voluntariness of any confession made by Malinski, including the one made in the early hours of October 27th at the Bath Beach station house."

We do not perceive what more the court could have done in dealing with Malinski's confession than it did, other

than to reject it entirely and this it had no right to do (*People* v. *Doran*, 246 N. Y. 409). The court fully complied with the admonition in *People* v. *Alex* (265 N. Y. 192):

> "In every case where there is a substantial question of the voluntary nature of a confession obtained while a defendant is in the custody of the police and arraignment is delayed, it is the duty of the trial judge, at least upon request of counsel, to charge that any 'unnecessary delay' in arraignment is forbidden by law and should be considered by them."

In *People* v. *Mummiani*, *supra*, it was pointed out:

> "Whatever the rule may be in other jurisdictions (*Bram* v. *United States*, 168 U. S. 532), our law does not require that a confession to be admissible shall be a spontaneous utterance made by a defendant to relieve his conscience."

Here, as we have seen, Malinski whether it was to relieve his conscience or not, did what Judge Lehman envisaged: within a few hours of the commission of the homicide, he unbosomed himself of a "spontaneous utterance" than which there could be no clearer, or more unequivocal acknowledgement of guilt by one involved in a crime.

So far as alleged police brutality is concerned, the issue is controlled by *Lyons* v. *Oklahoma* (88 Supreme Court Law. Ed. Advance Opinions 16):

> "There was also a third confession, oral, which was admitted in evidence on the trial, without objection by petitioner. This was given to a guard at the penitentiary two days after the second."

And, we quote again:

> "The fact that Lyons, a few days later, frankly admitted the killings to a sergeant of the prison guard, a former acquaintance from his own locality,

> under circumstances free of coercion, suggests strongly that the petitioner had concluded that it was wise to make a clean breast of his guilt, and that his confession to Dunn was voluntary."

The situations are transposed. Lyons first confessed, using the term in its formal sense, and then admitted the crimes, informally, to another official. Here Malinski made an open admission of his guilt at a time when no inducement existed to do so. He talked freely, at about the same time, with Spielfogel, about the happenings of the fatal night in Coney Island. He had no reason to believe then that the confidence he had reposed in his relatives and the Goonan girl and Spielfogel would be violated. The natural instincts of his relatives and of the Goonan girl threw about him the cloak of their protection. Spielfogel and himself were much of the same ilk: thus he had no reason to believe that he ever would suffer betrayal from that source.

We quote again from *Lyons* v. *Oklahoma:*

> "The voluntary or involuntary character of a confession is determined by a conclusion as to whether the accused, at the time he confesses, is in possession of 'mental freedom' to confess to, or deny, a suspected participation in a crime. *Ashcraft* v. *State of Tennessee*, 321 U. S.—No. 391, October term, 1943, decided May 1, 1944; *Hysler* v. *Florida*, 315 U. S. 411, 413, 86 L ed 932, 934, 62 S. Ct. 688."

Certainly, Malinski was possessed of "mental freedom" at the time he made his oral confession. That he was deprived of it, later, when he made his official confession it is impossible, from all of the circumstances, to believe.

Applicable, also, is *United States* v. *Mitchell* (322 U. S. 65):

> "It is these admissions and that property which supported the convictions, and which were deemed by the court below to have been inadmissible. Obvious-

> ly the circumstances of disclosure by Mitchell are wholly different from those which brought about the disclosures by the McNabbs. Here there was no disclosure induced by illegal detention, no evidence was obtained in violation of any legal rights, but instead the consent to a search of his home, the prompt acknowledgment by an accused of his guilt, and the subsequent rueing apparently of such spontaneous cooperation and concession of guilt."

Dealing with a long delay in arraignment, the court continued:

> "But the circumstances of legality attending the making of these oral statements are nullified, it is suggested, by what followed. For not until eight days after the statements were made was Mitchell arraigned before a committing magistrate. Undoubtedly his detention during this period was illegal. The police explanation of this illegality is that Mitchell was kept in such custody without protest through a desire to aid the police in clearing up thirty housebreakings, the booty from which was found in his home. Illegality is illegality, and officers of the law should deem themselves special guardians of the law. But in any event, the illegality of Mitchell's detention does not retroactively change the circumstances under which he made the disclosures. These, we have seen, were not elicited through illegality. Their admission, therefore, would not be used by the Government of the fruits of wrongdoing by its officers. Being relevant, they could be excluded only as a punitive measure against unrelated wrongdoing by the police."

The District Attorney's Summation.

In the prevailing opinion of the Court of Appeals, the author thus discusses the subject:

> "It is next urged upon us that the Assistant District Attorney gave his views as to the reason why Malinski was left in his underclothes and we are asked to reverse because of that. The three defendants on trial were represented by experienced counsel. It is true the Assistant District Attorney made the statements quoted in the dissenting opinion. The summation covers sixty-three printed pages. The first quotation is twenty-nine pages before the second. The District Attorney was interrupted by counsel fourteen times. Nearly all of those objections were made by the attorney for Malinski. Yet no interruption by objection was made to the remarks quoted. *That is no excuse for the remarks but it is some indication of the fact that none of the counsel took them seriously.* The remarks were indefensible. Whether under the circumstances a new trial should be ordered for Malinski because of these disconnected and disjointed utterances which at the time of their utterance brought not a single one of the counsel to his feet to make objection, is a matter of judgment. Our judgment is that the verdict should stand and be affirmed. Even apart from the fact that it did not appear important enough to counsel to cause them to register an objection immediately, the effect of the utterances it seems to us would inure to the benefit of Malinski rather than against him and they did not relate to Rudish or Indovino." (Italics ours.)

The record fully supports Judge Conway's observations. It is true that none of counsel took the objectionable remarks seriously, either as they were uttered, or as the summation ended. Thus, at the close of the summation, counsel for Malinski took exception to the reference to Ma-

linski's sister and the failure to call her as a witness and the argument that damaging testimony would have been elicited from her, if she had been called. The court sustained the objection and instructed the jury to disregard the argument (R. 1311). At the same time the court denied a motion for the withdrawal of a juror (R. 1311).

As we turn to counsel's interruptions of the summation we find that some not too serious objections were made to references to the testimony. They amounted simply to a colloquy between court and counsel and the result seems to have been satisfactory.

Then, we find that the district attorney, referring to Shirley Di Pisa, argued (R. 1268):

> "Where is his sister Shirley Di Pisa? Where is that girl? Where is that woman?"

Counsel objected to this argument and was overruled. Again the district attorney's argument was (R. 1290):

> "* * * and I say, if there was any answer to it, and it did not happen, the sister, Mrs. Di Pisa, should be in here."

Again counsel objected to the argument. The objection was overruled (R. 1290). The district attorney continued:

> "And if she is not here, you can draw the inference that her testimony would be damaging to him."

Counsel again objected, but no ruling was made. However, as we have seen, the court, at the conclusion of the summation, reversed itself as to the legal effect of Mrs. Di Pisa's absence.

The district attorney, discussing Kovner's testimony, argued (R. 1293):

> "* * * he saved these three defendants from being killed at the hands of Beitler—why would he save them one year and then come down here from Attica prison, and try to convict them of murder."

Counsel for Malinski objected to the statement and the court upheld him, saying (R. 1293):

> "The jury will disregard the District Attorney's statement unless it is borne out by the fact. The jury's recollection of the evidence will control."

The district attorney later argued with respect to the psychiatrists' examinations of Spielfogel "and the others", and the fact that it is a common practice for criminals to lie to such examiners (R. 1304):

> "Of course they lie about these things. These men told you they are up in the 'bug house'. Indovino says he was up in the 'bug house'."

The objection of counsel for Indovino to the argument was sustained.

It is plain, therefore, that counsel did not hesitate to interrupt the district attorney's summation, but the interruptions were upon immaterial things, while the more important ones—the "indefensible statements" as they have been characterized—were entirely ignored. We repeat, it is true, therefore, that counsel, at least as they were uttered, did not take them seriously.

We turn now to what happened at the close of the summation. Counsel for Malinski asked for the withdrawal of a juror and the declaration of a mistrial "upon all the other exceptions taken during the course of the summation". Then occurred (R. 1311):

> "The Court: What other points do you have so that there will be no mistake?
>
> Mr. Solovei: The ones I made during the summation.
>
> The Court: Repeat them.
>
> Mr. Solovei: I don't know. I made them during the time I got up.
>
> The Court: Repeat them.
>
> Mr. Solovei: I cannot remember now. The record will show.
>
> The Court: The motion is denied."

Thus far where is there any indication, anywhere, that counsel regarded the "indefensible statements" seriously?

One of counsel for Rudish now interposed an objection to the district attorney's argument. The court pointed out that it was mere argument and overruled the objection (R. 1312). Thus far, counsel for Rudish, too, took no occasion to voice their objections to any of the district attorney's "indefensible statements".

One of counsel for Indovino now objected to the summation "in its entirety". The court asked counsel to point out what he had in mind (R. 1313). A long colloquy ensued in which parts of the testimony were discussed. Finally, counsel for Indovino objected to the district attorney's statement that "there is nothing in holding these defendants for sixty hours or more without arraigning them".

The court sustained the objection (R. 1314). Further lengthy colloquy followed. No reference is made therein to the "indefensible statements". It was not until the very end that one of counsel for Rudish objected to the remarks of the district attorney with respect to the detention of Malinski as "highly improper, and illegal". The court inquired:

> "Does Malinsky's counsel make an objection?"

Counsel for Malinski vaguely replied:

> "I made my objection on the record."

We have seen that he did not. Then, plainly as an afterthought, counsel asked for the withdrawal of a juror and the declaration of a mistrial on the basis of the district attorney's remarks (R. 1320).

We believe we have proved that counsel did not take the district attorney's "indefensible statements" seriously.

If counsel were as unperturbed as the record discloses they were about the objectionable remarks of the district attorney when uttered and asked for no ruling upon them,

it is plain that the complaint later made concerning them, and now repeated, is not in all sincerity.

We are aware that this court is not concerned with the district attorney's summation and would have no control over it ordinarily, and that its only significance, as a Federal question, goes to the question of whether or not it is true that Malinski was coerced into the confession he made to Mr. Heffernan and therefore denied process of law. The only reason we have referred to counsel's quiescent reaction to the summation and failure on the part of Malinski's counsel to voice any objection to the "indefensible statements", is that it is fair, sound argument on Judge Conway's part when he says it seemed to the majority of the court that the district attorney's utterances "would inure to the benefit of Malinski rather than against him".

These remarks inured to Malinski's benefit for this reason:

It was for the jury to determine whether or not Malinski's confession was voluntary. Malinski's claim was that it was not. The issue was met by the testimony of the police officers that he was not beaten or coerced. If the district attorney conceded that the police endeavored to induce in Malinski a belief that he was going to be beaten, if the district attorney went that far, then, if the scales were evenly balanced, the jury might well have accepted Malinski's version of the circumstances under which the confession was obtained. It was the jury's right to accept it or reject it. In other words, the jury could have reasoned:

Malinski says he was beaten; the police deny that; the district attorney is candid enough to say that the police let him believe he was going to be beaten for the psychological effect such a mode of dealing with him might have upon him.

The jury might well have reasoned that the district attorney's concession lent verity to Malinski's claim and might have accepted his testimony in its entirety as truthful.

We say it is a fair conclusion that that was the attitude of Malinski's counsel in not interrupting his opponent: that he felt that instead of hurting Malinski the district attorney's argument helped him and he was willing, by remaining silent, to speculate that such an effect would follow.

Finally, in so far as Malinski is concerned, the majority opinion in the case at bar is in consonance with *People* v. *Slover* (232 N. Y. 264):

> "We have assumed in each case on its particular facts that the jury were not affected by such matters, but by affirming the judgment of conviction we have not approved the conduct of the district attorney. We have dealt with it as the result of 'well-intentioned though misguided zeal' which probably was unheeded by the jury and had no inference on their final action, while in the case of a vigorous dispute over a defendant's mental capacity we have not hesitated to order a new trial for such excesses on the part of the prosecutor. (*People* v. *Esposito*, 224 N. Y. 370. See, also, *People* v. *Mull*, 167 N. Y. 247; *People* v. *Wolf*, 183 N. Y. 464, 472.)"

The court, earlier (*People* v. *Conklin*, 175 N. Y. 333) had said:

> "The case must be quite exceptional where a question of law, reviewable in this court, is presented, based upon the address of the prosecuting officer."

We submit that this record does not present such an exceptional case.

The Case of Rudish.

We promised in the beginning to demonstrate that Rudish has no standing on this application. Rudish did not vouchsafe a formal confession. The only confession he made is what may be deemed as such in his admissions to Spielfogel before and after the commission of the homi-

cide. Therefore, there is no question of due process involved as to him, because there is nothing that he said that was coerced from him in any manner. All that he said was said freely and voluntarily. It is sought to invoke the due process amendment in Rudish's favor, however, because, it is said, the "device" by which the court suppressed the names of his confederates in Malinski's confession as it was read to the jury proved "futile". In support of the claim that, therefore, Rudish's rights were prejudiced *Anderson* v. *United States* (318 U. S. 350) is cited. An excerpt of the opinion is set forth. What is not set forth is its context:

> "So also, while the trial judge appeared to admit the confessions 'only to be used against the persons who made them' his charge bound the jury to no such restricted use of the confessions. On the contrary, from what the trial judge told them the jury had every right to assume that in ascertaining the guilt or innocence of each defendant they could consider the whole proof made at the trial. There is no reason to believe, therefore, that confessions which came before the jury as an organic tissue of proof can be severed and given distributive significance by holding that they had a major share in the conviction of some of the petitioners and none at all as to the others."

That is not the situation here. Before we proceed to discuss what happened here, we beg leave to point out that *Anderson* v. *United States*, *supra*,[12] has no application. No Federal question is involved in Rudish's case.

"Matters of this sort are addressed to the discretion of the trial judge" (*Stroud* v. *United States*, 215 U. S. 15, 20), and where the decision is that of a state court it is

12. Neither has *Viereck* v. *United States* (318 U. S. 236). Both cases involved the application of summary Federal judicial power, and neither dealt with an exclusively procedural state matter.

not subject to review here (*Barrington* v. *Missouri*, 205 U. S. 483; *Thomas* v. *Texas*, 212 U. S. 278, 281-282).

In the case at bar, as the confession was about to be read to the jury, the following occurred, as counsel for Rudish (Mr. Carabba) and Indovino (Mr. Geoghan) asked that the jury be instructed that the confession was binding only on Malinski (R. 618-620):

> "I am going to make certain observations, and I am going to ask the jury to pay strict heed to what I say. You are about to hear an alleged statement read. The Court has together with counsel read that statement, and the Court is forewarned as to what it contains. You will hear read matters concerning a Mr. X and Mr. Y. Those names, Mr. X and Mr. Y, have been substituted by order of the Court for names in the confession. Those names have been deleted by order of the Court from the confession; that is, names other than the defendant Malinski and the defendant Beitler. You have no right to speculate as to who Mr. X and who Mr. Y are. Is that clear? You have no right to jump to any conclusions as to who Mr. X and Mr. Y are. As far as you know, it may be Christopher Columbus, it may be John Doe, it may be one of five or five hundred million people. Is that clear? You have no right to infer that the X and the Y referred to are either or both of the other defendants, namely, the defendant Rudish and the defendant Indovino. Now, I cannot impress that upon you too strongly. I believe my English is simple and it is understandable, and I am addressing you jurors in a forthright manner. I am going to conduct this case in the manner provided by law and in fairness to everybody concerned. Each defendant's case must be judged on its own merits, and only the evidence that applies to him must be considered, and no other evidence. The jury has no right to guess or surmise. The jury's verdict must be based only on evidence. I have cautioned you in a manner that cannot be mis-

understood. Now, when you hear this confession read the X and the Y are anonymous persons, and you have no right to even guess as to who they are. Can I say more than that, Mr. Geoghan? Can I say more than that, Mr. Carabba?"

Brief colloquy followed between the court and counsel which ended thus (R. 620):

"The Court: Is there anything else you desire the Court to do?

Mr. Geoghan: *Nothing whatever, I think it is full and complete.*

Mr. Carabba: *Nothing whatever on behalf of the defendant Rudish.*

The Court: *You are both satisfied with the instructions?*

Mr. Geoghan: *Yes, your Honor.*" (Italics ours.)

The court followed a procedure that has been pursued almost without exception in the State of New York in cases of joint trials.

In *People* v. *Snyder* (246 N. Y. 491), the court pointed out:

"Throughout the trial and in his charge, the trial justice with scrupulous care protected the rights of both defendants. He pointed out to the jury that they might not consider the confession of either as against the other. The fact that one defendant has made a confession which will be admissible against himself but not against a co-defendant may be a circumstance which enters into the court's consideration of whether a joint trial would be fair (*Commonwealth* v. *Borosky*, 214 Mass. 313; *United States* v. *Ball*, 163 U. S. 662). It depends upon the circumstances of the particular case whether a jury can weigh properly the testimony produced upon the various issues that may arise in a joint trial."

In *People* v. *Fisher* (249 N. Y. 419), the court, passing upon the same issue, said:

> "Varying circumstances bear upon the soundness of discretion to be exercised under section 391 of the Code of Criminal Procedure in refusing to grant motions for separate trials. The rule is not doubtful. * * * Its correct application must rest upon the facts in each case. Prospection by the trial judge is not final. In a case where, without the existence of a confession by one defendant, the evidence against another would be too weak to justify a conviction, or even where a conviction would be doubtful, our review of the judgment would compel us to conclude that an abuse of discretion had been committed."

As we pointed out in the beginning, Rudish completely foreclosed himself from relief either in the Court of Appeals, or in this court, when he declined, in the midst of the trial, an offer of a separate trial as to him. The record discloses (R. 766-767):

> "The Court: Do I understand, Mr. Carabba, that you made a motion for a severance in this case?
>
> Mr. Carabba: No, I did not. I was under the impression that we did, and I just asked Mr. Meadow. We had discussed it.
>
> The Court: Do you make a motion for a severance?
>
> Mr. Carabba: No, I don't. *I am going to stand on this record.*
>
> The Court: *You don't want a severance?*
>
> Mr. Carabba: *Not at this time, Judge Leibowitz.* (Italics ours.)

Later, counsel for Rudish emphasized his position when the court inquired whether he wished to take advantage of *People* v. *Fiola*[13] (R. 769):

> "Mr. Carabba: I don't know anything about the Fiola case. *All I can truthfully answer, your Honor,*

13. (282 N. Y. 276.)

is that we do not wish a severance at this time." (Italics ours.)

The subject was never opened up again.

That is not all, as far as Rudish is concerned. Counsel for Rudish on the trial, in his summation, far from attacking the police conduct of the case, gave full countenance to it. He said to the jury (R. 1173-1174):

> "I am not here to pass upon or even to criticize the conduct and the deportment of the police officers in this case. You will recall that when the witness, the defendant Rudish, took the stand, he said that from the time of his arrest he told the detectives and the District Attorney that he knew nothing about this crime. You will have to say to yourselves, 'Was this Room 608 in the Hotel Bossert, a station house?' 'No.' 'Was it the office of the District Attorney?' 'No.' 'Was it a Magistrate's Court?' 'No.' It was a room used and occupied by the police, to bring whoever they suspected of having anything to do with this crime, where they could work out the process of giving a man a workout. That is all it is. A reputable hotel in this County used by the police to question and question and question for hours those that were accused of crime. I find no fault with that. I find no fault with the police using every honest effort to bring to justice those who have committed this cowardly crime of killing Leon Fox, whom I have had the pleasure of knowing and knew personally."

In Conclusion.

We respectfully submit:

As to Malinski.

That he was accorded a fair trial. That his confession was freely and voluntarily made. That no violence was used to coerce it from him. That the issue whether it was

or not was submitted to the jury under instructions that met every legal requirement. That the district attorney's summation, or at least so much of it as has been denominated "indefensible" was acquiesced in by counsel, for reasons which we have fully demonstrated and that, therefore, no question of due process is involved.

As to Rudish.

That he has no standing on this application. That no question of a coerced confession is involved as to him, but that his conviction rests on his admissions to Spielfogel, clearly and unmistakeably pointing to his guilt. That Malinski's confession was received in evidence, under proper instructions under approved state law, that it was binding only on him and that no constitutional question is presented as to him.

II.

The petition should be denied.

Respectfully submitted,

THOMAS CRADOCK HUGHES,
Acting District Attorney,
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HENRY J. WALSH,
Assistant District Attorney,
Of Counsel.

Appendix.

Section 517, New York Code of Criminal Procedure.

"§ 517. *In what cases appeal may be taken by defendant.*

An appeal to the supreme court may be taken by the defendant from the judgment on a conviction after indictment, except that when the judgment is of death, the appeal must be taken direct to the court of appeals. * * * "

Section 1045-a, Penal Law of the State of New York.

"§ 1045-a. *Life imprisonment for felony murder; jury may recommend.*

A jury finding a person guilty of murder in the first degree, as defined by subdivision two of section ten hundred forty-four, may, as a part of its verdict, recommend that the defendant be imprisoned for the term of his natural life. Upon such recommendation, the court may sentence the defendant to imprisonment for the term of his natural life."